SUPREME COURT, U.S.
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No. 08-1525

IN THE

Supreme Court of the United States

IMPROV WEST ASSOCIATES, and
CALIFORNIA COMEDY, INC.,

Petitioners,

v.

COMEDY CLUB, INC. and
AL COPELAND INVESTMENTS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED[1]

1. Whether the Court's holding in *Hall Street Assoc., L.L.C. v. Mattel, Inc. (Hall Street)* prevents the Ninth Circuit from partially reversing an arbitrator's decision that was in "manifest disregard of the law" and therefore exceeded the scope of his authority under the Federal Arbitration Act?

2. Whether a true and mature circuit split has been created after *Hall Street* when all deciding circuit courts but one have ruled that arbitral decisions subject to the Federal Arbitration Act can only be reviewed pursuant to the grounds set forth in the Federal Arbitration Act?

3. Whether the Ninth Circuit committed reversible error in finding, consisting with its precedent, that an arbitrator who recognized the law and then ignored it has exceeded his authority and based thereon partially reversed the arbitrator's award?

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[1] Petitioners are not seeking re-hearing on the Ninth Circuit's determination that the arbitrator exceeded the scope of his authority in extending the application of the parties' contract to all "affiliates". Accordingly, Respondents do not revisit that issue either.

CORPORATE DISCLOSURE STATEMENT

The Respondents, Comedy Club, Inc. and Al Copeland Investments, Inc. have no parent corporation, and no publicly held company owns 10% or more of their stock.

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SUMMARY

Petitioners seek review of the Ninth Circuit's ruling below finding that an arbitrator who was aware of a material state law but chose to ignore it acted in "manifest disregard of the law" and therefore exceeded the scope of his authority under the Federal Arbitration Act (FAA). "Manifest disregard of the law" is a historically grounded and well-established legal standard for reversing an arbitral decision. As many courts have iterated, it is a notably high standard arising out of and generally defining the specific enumerated grounds set forth in the Federal Arbitration Act (FAA). Petitioners, however, argue that it should now be abrogated. In doing so, Petitioners, seek to bootstrap their Petition into a rewriting of what they wanted this Court's recent decision in *Hall Street* to say, rather than what it actually said.

Petitioners argue that the Ninth Circuit below misapplied the law of this Court and did so in a manner that is squarely at odds with every other circuit in the country. This is simply not accurate – the Ninth Circuit properly applied the law in a manner consistent both with this Court's precedent and with the other majority circuits. The decision below does not conflict with any decision of this Court, nor does it implicate a federal question that has not been decided by this Court.

The Ninth Circuit below establishes no new principles, but merely applies this Court's holding in *Hall Street* as well as that of its own binding precedent. Moreover, the Ninth Circuit did so consistently with most other circuit courts that have dealt with the matter

after *Hall Street*. Because there is no mature conflict in the courts of appeals and because the Ninth Circuit's ruling below is consistent with *Hall Street* and other Supreme Court and federal precedent, this case does not posit useful or proper grounds for this Court's review.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE COURT'S HOLDING IN *HALL STREET ASSOC., L.L.C. v. MATTEL, INC.* DID NOT PRECLUDE THE NINTH CIRCUIT FROM PARTIALLY REVERSING AN ARBITRATOR'S DECISION THAT WAS IN "MANIFEST DISREGARD OF THE LAW" AND EXCEEDED THE SCOPE OF HIS AUTHORITY UNDER THE FEDERAL ARBITRATION ACT.

A. *Hall Street* Agreed With the Ninth Circuit's Applied Standard for Reviewing Arbitration Decisions.

The question before the Supreme Court in *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. __, 128 S.Ct 1396, 170 L.Ed. 2d 254 (2008) was whether the Ninth Circuit erred when it held that the FAA precludes a federal court from enforcing the parties' clearly expressed contractual agreement providing for more expansive judicial review of an arbitration award than the narrow standards of review otherwise set forth in the FAA.

In *Hall Street*, the parties consented, while they were in the middle of their district court case, to arbitrate certain issues in their case. Their arbitration agreement expressly provided for *de novo* review of the arbitrator's legal rulings for errors of law, which is a considerably more expansive scope of reviewing arbitral awards than provided by the FAA. Following the arbitrator's issuance of an award in favor of Mattel, Hall Street invoked this contractually agreed upon standard of review and moved to vacate the award against it. The district court vacated it and remanded the case back to the arbitrator for reconsideration. When the arbitrator reversed the prior award against Hall Street, it moved for confirmation of the new award and the district court at that time confirmed it.

In the midst of these proceedings, the Ninth Circuit had just issued its ruling in *Kyocera Corp. v. Prudential Bache Trade Servs. Inc.*, 341 F. 3d 987 (9th Cir. 2003), construing the FAA as setting forth the exclusive grounds by which an arbitrator's decision could be vacated, modified or corrected and holding that parties may not contractually impose their own standard on the courts. In light of this ruling, Mattel immediately appealed the District Court's decision because it upheld an arbitration provision that permitted for the more expansive type of arbitration review that *Kyocera* had just made unavailable in the Ninth Circuit. See, *Hall Street Assoc., LLC v. Mattel, Inc.*, 113 Fed. Appx. 272, 2004 WL 2596020 (C.A. 9 (Or.))[2]

[2] This decision was not selected for publication and is not cited herein for its authority but solely for its historical significance to explain the context and trajectory of the Court's ruling in *Hall Street*.

Mattel argued that the FAA permitted a court to overturn an arbitrator's decision solely on the grounds delineated in Sections 10 and 11 of the statute and that parties should not be permitted to replace this framework with contractually customized terms that go beyond these grounds. Accordingly, the express question before the Supreme Court in *Hall Street* was "whether statutory grounds for prompt vacatur and modification may be supplemented by contract." (*Hall Street*, 128 S.Ct. at 1400)

In reaching a decision on this issue, *Hall Street* addressed the split in authorities across the nation wherein some circuits, like the Ninth Circuit, regarded the statutory grounds set forth in the FAA as exclusive grounds for vacatur of an arbitrator's award, whereas others believed it open to expansion by the parties' agreement. (*Hall Street*, p. 1403) This Court concluded in *Hall Street* that the statutory grounds set forth in the FAA are indeed exclusive and cannot be expanded by contract. (*Id.* pp. 1400, 1403) In doing so, this Court repeatedly and expressly "agreed" that the Ninth Circuit was applying the correct standard of review under the FAA:

> We agree with the Ninth Circuit that [the grounds for vacatur and modification provided by Sections 10 and 11 of the FAA are exclusive], but vacate and remand for consideration of independent issues.

(*Hall Street*, p. 1401)

* * *

> And the Ninth Circuit, for its part, seemed to take it as a given that the District Court's

> direct and prompt examination of the award depended on the FAA; it found the expanded-review provision unenforceable under *Kyocera* and remanded for confirmation of the original award 'unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11.'

(*Hall Street*, p. 1407)

B. *Hall Street* Did Not Silently Abolish Decades of Legal Precedent and Abrogate Manifest Disregard of the Law As a Ground for Vacatur.

Petitioners argue that this Court's decision in *Hall Street* dictates that the doctrine of "manifest disregard of the law" be abrogated.[3] (Petition p. 23) This is a forced and inaccurate reading of *Hall Street*.[4]

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[3] Petitioners also argue that "*Hall Street* requires that every procedurally proper arbitration award be confirmed." (Petition p. 25) This is not explained further in the Petition and is, therefore, too vague to be addressed. Specifically, it is not clear whether Petitioners are arguing for yet another new standard to supplant the FAA and "manifest disregard" of the law, or whether Petitioners are advocating for this to be the new interpretation of the grounds set forth in the FAA. Petitioners create more questions than it settles. For example, when an arbitrator is charged with applying the law of California but instead accurately applies the law of Texas, would that be a "procedurally proper" award that Petitioners would demand be confirmed?

[4] Indeed, if Petitioners are correct, then surely Congress would not have stood by for over five decades in silence as post-

(Cont'd)

Contrary to Petitioner's arguments, *Hall Street* did not create a new rule for the Ninth Circuit. Indeed, neither *Hall Street*, nor any other Supreme Court decision, has found that the long established "manifest disregard of the law" standard is no longer valid. *Hall Street* did, on the other hand, make allowance for the assumption that Sections 10 and 11 of the FAA "could be supplemented to some extent". (*Hall Street*, p. 9).

More importantly, although *Hall Street* made no specific ruling on the issue one way or another, because it was not an issue in the case, this Court acknowledged that in its own precedent, it had previously invoked "manifest disregard of the law" as a standard for vacatur of an arbitrator's ruling under the FAA. (*Hall Street*, p. 8, *citing*, *Wilko v. Swan*, 346 U.S. 427 (1953)).[5]

In *Wilko*, the High Court stated that erroneous interpretations of the law by the arbitrator, "in contrast

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(Cont'd)

Wilko courts throughout the country repeatedly ran afoul of the FAA. More likely, however, Congress did not believe the courts' reliance on manifest disregard of the law in vacating arbitration awards under the FAA as being inconsistent with the FAA. *Hibbs v. Winn*, 542 U.S. 88, 112 (2004)(Stevens, J. concurring)(that "prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo.")

[5] This Court has also reiterated in decisions after *Wilko* that arbitration awards are subject to review for manifest disregard of the law. *See, e.g. First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 259 (1987) and *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 601 (1985).

to manifest disregard [of the law]" are not subject to judicial review by the federal courts. (*Wilko*, pp. 436-37) (brackets in original). When asked by *Hall Street* to interpret this language as a "further ground for vacatur on top of those listed in § 10", the *Hall Street* Court refused, stating only that "this is too much for *Wilko* to bear." (*Hall Street*, pp. 8-9).

However, the High Court did not go as far as Petitioners now advocate and declare a total abrogation of the "manifest disregard of the law" vacatur ground. Rather, the *Hall Street* Court pointed out that although *Wilko* was vague in its phrasing, both the Supreme Court and the Ninth Circuit have found "manifest disregard of the law" as arising out of the FAA. (*Hall Street*, p. 8).

Specifically, *Hall Street* cited to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) for having explained "manifest disregard of the law" as generally referring to the § 10 grounds collectively, rather than adding to them. (*Id.*, p. 8).

Petitioners further argue that the policies underlying the FAA also dictate that the doctrine of "manifest disregard of the law be abrogated." (Petition p. 23) This is equally unavailing. Judicial review of the arbitration award in this case based upon the arbitrator's manifest disregard of the law is fully consistent with the national policy favoring arbitration because it is necessary to preserve the parties' contractual expectations that the arbitrator will not exceed the authority afforded to him by the parties' agreement and the law. *Hall Street*, 128 S.Ct. at 1405.

In vacating a portion of the Award, the Ninth Circuit did not "open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring arbitration theory to grief in the post-arbitration process." *Id.* (*quoting Kyocera*). The proper limitation of the arbitration award here will not, and has not, engendered a cumbersome or time-consuming process, in contrast to Petitioners' own repeated attempts to undo the Ninth Circuit's reasoned opinion.[6]

The Ninth Circuit's decision partially vacating the arbitrator's award on the basis of his manifest disregard of a California statute is fully consistent with the current "national policy favoring arbitration with . . . limited review." *Hall Street*, 128 S.Ct. at 1405.

C. The Ninth Circuit's Holding Below Is Consistent With *Hall Street*.

Following this Court's grant of certiorari, below, and remand for further consideration in light of its subsequent ruling in *Hall Street*, the Ninth Circuit demanded and considered substantive briefing from the

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[6] In fact, the two Ninth Circuit cases that have dealt with the issue of "manifest disregard of the law" after *Hall Street* and after the amended opinion below, both denied requests to vacate arbitration awards due to alleged manifest disregard of the law, arguing that it is an extremely limited standard. *See, Cockerham v. Sound Ford, Inc.* (unpublished opinion) 2009 WL 1975426 (9th Cir. (Wash))(cited for example herein and not as authority); *Bosack v. Soward*, __ F.3d __, 2009 WL 2182898 (9th Cir. (Wash)).

parties on the issue of whether, and how, *Hall Street* affected its decision below in the case herein. Petitioners falsely misrepresent to the Court that "the Ninth Circuit did not heed this Court's instructions but instead reinstated the prior decision practically verbatim with only a passing discussing of *Hall Street*." (Petition p. 18) This is not so. The Ninth Circuit considered the issue and addressed it thoughtfully.

The Ninth Circuit devoted substantial consideration and analysis to the issue posed to it by this Court:

> Improv West argues that manifest disregard of the law is not among the statutory grounds for vacatur, and therefore we must amend our prior option that vacated this part of the arbitrator's award for that reason.
>
> * * *
>
> We have already determined that the manifest disregard ground for vacatur is shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4), which state that the court may vacate "where the arbitrators exceeded their powers." [*citation omitted*] The Supreme Court did not reach the question of whether the manifest disregard of the law doctrine fits within §§ 10 or 11 of the FAA. [*citation omitted*] Instead, it listed several possible readings of the doctrine, including our own . . . We cannot say that *Hall Street*

> *Associates* is "clearly irreconcilable" with *Kyocera* and thus we are bound by our own precedent."

(Petitioner's App. pp. 24 – 25).

In the case herein, the parties had contractually agreed to and did arbitrate their claims in accordance with the arbitration rules of the American Arbitration Association. At the conclusion of the arbitration, the arbitrator issued an award that, among other things, enjoined both the parties and numerous non-parties from "opening or operating any other comedy clubs . . . for the duration of the [twenty year] Trademark Agreement". (Petitioner's App. p. 7)

In reviewing the arbitration award at issue, the Ninth Circuit never attempted to invoke or apply an arbitration review standard that was outside the FAA. In fact, the Court below specifically considered and relied on *Kyocera,* which is indicative of the Ninth Circuit's position that "manifest disregard" is a standard encompassed by the articulated FAA grounds:

> Congress has explicitly prescribed a much narrower role for federal courts reviewing arbitral decisions. The Federal Arbitration Act [. . .] enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitration award . . . Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision . . .

(*Kyocera*, pp. 12516-17).

The *Kyocera* Court unequivocally determined that "manifest disregard of law" is encompassed in the FAA:

> [I]t is clear that the "exceeded their powers" clause of § 10(a)(4) . . . provides for vacatur only **when arbitrators purport to exercise powers that the parties did not intend them to possess or otherwise display a manifest disregard for the law.**

(*Id.*, p. 12531) (emphasis added).[7]

In relying on *Kyocera*, the Court below acknowledged that *Hall Street* did not reach the specific question of whether the manifest disregard of the law doctrine fits within the FAA. (Petitioner's App. p. 24). However, the Court reasoned further that *Hall Street* "listed several possible readings of the doctrine, including our own." (Petitioner's App. p. 24). Because

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[7] The Ninth Circuit confirmed the *Kyocera* principle again in *Schoenduve Corp. v. Lucent Technologies, Inc.*, 442 F. 3d 727, 731 (9th Cir. 2006):

> A federal court may vacate an award if the arbitrator engages in misbehavior that prejudices a party, or if the arbitrator exceeds his powers in rendering such an award. 9 U.S.C. § 10(a)(3)-(4). "**[A]rbitrators exceed their powers in this regard not when they merely interpret or apply the governing law incorrectly, but when the award is completely irrational, or exhibits a manifest disregard of law.**" *Kyocera Corp.*, 341 F. 3d at 997 (internal quotation marks and citations omitted).

(Emphasis added).

of this, and relying on *Hall Street*'s express openness to the possibility that "manifest disregard" may be just shorthand for § 10(a)(3) or § 10(a)(4) of the FAA, the Ninth Circuit concluded that "manifest disregard remains a valid ground for vacatur because it is a part of § 10(a)(4). (Petitioner's App. p. 24).

Thus, when it upheld its ruling based on the "manifest disregard of the law" standard in the case below, the Ninth Circuit did so relying on *Hall Street*'s express language.

II. NO TRUE AND MATURE CIRCUIT SPLIT CAN BE SAID TO EXIST AFTER *HALL STREET* WHEN ALL DECIDING CIRCUIT COURTS BUT ONE HAVE RULED THAT ARBITRAL DECISIONS SUBJECT TO THE FAA CAN ONLY BE REVIEWED PURSUANT TO THOSE EXCLUSIVE GROUNDS SET FORTH IN THE FAA.

Petitioners argue that the Circuits are "sharply divided as to the validity of 'manifest disregard' as a ground for vacatur after *Hall Street*". (Petition, p. 15) However, this is a contorted view of the few published cases that have dealt with the issue after *Hall Street*. Indeed, rather than contribute to a circuit split, *Hall Street* has actually galvanized the majority of the circuits which are, for the most part, consistent. They reject any grounds for vacatur under the FAA that fall outside the enumerated grounds of the statute and they do not allow "manifest disregard of the law" as an independent, non-statutory ground for vacating arbitration awards. Most of the published opinions that allow "manifest disregard" to remain as a valid analytical vehicle for

reviewing arbitration decisions do so only to the extent that it is a standard arising out of and defining the grounds of the FAA itself.

The First Circuit, albeit with little discussion, has concluded that *Hall Street* abolished manifest disregard of the law as a ground for vacatur. *See Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (acknowledging the holding in *Hall Street Assocs., L.L.C. v. Mattel* but not applying it because the case before it was not subject to the FAA). In other decisions, the First Circuit is even less instructive.[8] *Zayas v. Bacardi Corp.*, 524 F.3d 65 (1st Cir. 2008), is a labor relations case that refers to "manifest disregard of the law" as "anchored in federal common law" but is otherwise silent on the FAA and *Hall Street*, thereby not providing its interpretation of this Court's opinion in *Hall Street*. (*Zayas*, p. 68) Similarly, *Kashner Davidson Securities Corp. v. Mscisz*, 531 F. 3d 68 (1st Cir. 2008) is also silent on its interpretation of *Hall Street*. However, in relying on "manifest disregard of the law" as a framework for reviewing arbitration awards, the Court stated that that the decision could be both in manifest disregard of the law and exceeding an arbitrator's authority under the FAA, and that the Court was expressly not suggesting that the "exceeding its power rationale" could not work as well in lieu of the "manifest disregard of the law" framework. (*Kashner*, p. 78)

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[8] The First Circuit may have an intra-circuit conflict. However, an intra-circuit conflict is generally not enough to constitute a circuit split nor a ground for exercise of this Court's certiorari jurisdiction. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957)(holding that it is "primarily the task of a Court of Appeals to reconcile its internal difficulties.")

The Second Circuit also recognized that *Hall Street*'s holding was in direct conflict with the application of manifest disregard as a nonstatutory ground for review, but resolved the conflict (like the Ninth Circuit) by regarding manifest disregard as a shorthand for § 10(a)(4) of the FAA. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93-95 (2nd Cir. 2008) (*cert. review granted*).[9] The Court acknowledged that *Hall Street* held that "the FAA sets forth the 'exclusive' grounds for vacating an arbitration award, while also acknowledging that this interpretation is inconsistent with some of its own prior dicta that treated the 'manifest disregard' standard as a ground for vacatur entirely separate from those enumerated in the FAA." *Id.* However, instead of directly concluding that *Hall Street* eliminated manifest disregard as a ground for vacatur under the FAA, the Court reasoned that manifest disregard of the law should be "reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA. . . ." *Id.*

The Fifth Circuit in *Citigroup Global Markets, Inc. v. Bacon*, 2009 U.S. App. LEXIS 4543 (5th Cir. March 9, 2009), addressed the issue of whether under the FAA, the statutory provisions are the exclusive grounds for vacatur and whether manifest disregard of the law as

[9] Petitioners cite to two other instances wherein the Second Circuit considered the issue of "manifest disregard of the law" after *Hall Street*. (Petition, p. 21) However, **Petitioners don't mention that both of these decisions are unpublished and not citable as authority**, so they can hardly be contributing to a circuit split. *See, Vaugh v. Leeds, Morelli & Brown, P.C* 315 Fed. Appx. 327 (2009) and *Rich v. Spartis* 307 Fed. Appx. 475, 478 (the decision does not even mention *Hall Street*).

an independent, nonstatutory ground for setting aside an award must be abandoned and rejected. *Citigroup* concluded that, based on its interpretation of *Hall Street*, arbitration awards under the FAA may be vacated only for reasons provided in § 10 of the FAA, and manifest disregard of the law could not be used as an independent, nonstatutory ground for setting aside an award. (*Id.* 355.) However, in reaching this conclusion specific to its case, the Sixth Circuit expressly acknowledged the reasonableness of the Second Circuit's opinion in *Stolt-Nielsen*, saying:

> In the full context of the Second Circuit's reasoning, this analysis is not inconsistent with *Hall Street*'s speculation that manifest disregard may, among other things, "have been shorthand for § 10(a)(3) or § 10(a)(4). . . ."
>
> We should be careful to observe, however, that this description of manifest disregard is very narrow. Because the arbitrator is fully aware of the controlling principle of law and yet does not apply it, he flouts the law in such a manner as to exceed the powers bestowed upon him.

(Citigroup, p. 357*)*

The Fourth Circuit opinion in *Qorvis Communications, LLC v. Wilson*, 2008 WL 5077823 (4th Cir. Dec. 2008) hardly contributes to an alleged circuit split either. *Qorvis* merely notes that the appellant claimed the arbitrator manifestly disregarded the law as one of the grounds for seeking a reversal of

the arbitration award. However, *Qorvis* does not discuss the manifest disregard standard at all nor does it address *Hall Street*. Rather, the Fourth Circuit merely found that none of the grounds advanced by appellant were sufficient to justify a vacation of the arbitrator's award.

The Seventh Circuit, although last contending with the issue of "manifest disregard of the law" before *Hall Street* was decided, is a fine example of the consistency with which the majority of the circuits view the doctrine. *Wise v. Wachovia*, 450 F.3d 265 (7th Cir. 2006). Namely, the Court states that "we have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground [of the FAA] — 'where the arbitrators exceeded their powers'." *Id.* at 269 (*citing* Ninth Circuit precedent, *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1059-60 (9th Cir. 1991)).

All of the aforementioned published Circuit Court opinions are largely consistent with the opinion of the Ninth Circuit Court below, that the grounds set forth in the FAA are the only grounds available for vacating an arbitration award and that manifest disregard of the law can be viewed and applied as defining and operating just within such grounds.

Indeed, the only Circuit Court that has reached an opinion squarely at odds with every other Circuit is the Sixth Circuit, and that is in an unpublished opinion. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 315 (6th Cir. 2008). In *Coffee Beanery*, the Court so narrowly construed the holding of *Hall Street* such that it

interpreted it to apply only to contractual expansions of the grounds for review. *Coffee Beanery,* pp. 418-19). *Coffee Beanery* only briefly considered the effect of *Hall Street* on manifest disregard of the law, stating that *Hall Street* "significantly reduced the ability of federal courts to vacate arbitration awards for reasons other than those specified in 9 U.S.C. § 10. . . ."[10] (*Id.*)

In sum, many of the Circuit Courts have yet to consider the issue of "manifest disregard of the law" in light of *Hall Street.* The few that already have are not so disparate so as to constitute a disruptive circuit split. Indeed, they are almost all consistent in their determination that, after *Hall Street*, the grounds set forth in the FAA are the exclusive grounds for vacating an arbitration award. Accordingly, there is no meaningful and mature split among the circuits so as to warrant this Court's intervention so soon after *Hall Street.* The petition for grant of certiorari should be denied.

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[10] While this is contrary to the direction that other circuits have taken, it is not a completely irrational reading of *Hall Street.* Citing *Hall Street*'s discussion of *Wilko,* which *Coffee Beanery* thought demonstrated a "hesitation to reject the 'manifest disregard' doctrine," and noting the acceptance of the standard by each and every court of appeals, the court concluded that it would be imprudent to cease vacating arbitration awards made in manifest disregard of the law. (*Coffee Beanery*, at p. 419)

III. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION BELOW CORRECTLY ISSUED A PARTIAL REVERSAL OF AN ARBITRATION AWARD AFTER DETERMINING THAT WHEN THE ARBITRATOR RECOGNIZED THE LAW AND THEN IGNORED IT, HE HAD EXCEEDED HIS AUTHORITY AND MANIFESTLY DISREGARDED THE LAW.

Petitioners falsely assert that the decision of the Ninth Circuit below conflicts with decisions of "every other circuit" applying the FAA. Petitioners assert that the Ninth Circuit "dramatically alters the standard for review of an arbitration award." (Petition p. 31). Specifically, Petitioners argue that the Ninth Circuit reversed the ruling of the arbitrator in its decision below merely for being "legally incorrect." (Petition pp. 28-29) This completely misrepresents the Ninth Circuit's decision below, both legally and factually.

The Ninth Circuit did not, as Petitioners say, reverse the arbitrator's ruling because it found it to be in "in good faith" but "incorrect." Rather, the Ninth Circuit reversed the arbitrator's ruling because it found that it was in "manifest disregard of the law." The Ninth Circuit consistently and correctly invoked and applied its own precedent in its standard for review of the arbitrator's award.

The Ninth Circuit's opinion expressly stated that "[i]t must be clear from the record that the arbitrator [ ] recognized the applicable law and then ignored

it." (*See* Petitioner's App. p. 25, *citing Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995) (bracketed text omissions in original).

The *Michigan Mutual* decision, at page 832, notably cited and relied upon another Ninth Circuit seminal holding, *Todd Shipyards Corp. v. Cunard Line Ltd.*, 949 F.2d 1056, 1060 (9th Cir. 1991). *Todd Shipyards* invoked Supreme Court precedent in explaining that:

> The Federal Arbitration Act, 9 U.S.C. at § 10, sets out the grounds upon which a federal court may vacate the decision of an arbitration panel. The statute addresses decisions influenced by corruption or undue influence, and cases in which arbitrators exceed their power under the terms of an agreement to arbitrate. Courts have interpreted this section narrowly, in light of Supreme Court authority strictly limiting federal court review of arbitration decisions. **It is generally held that an arbitration award will not be set aside unless it evidences a "manifest disregard for law".**

Id., at 1056 (invoking and citing to the *Steelworker Trilogy* cases previously decided by the Supreme Court) (emphasis added).

Furthermore, the Ninth Court below accurately and thoughtfully applied this near-universal standard to the case before it:

> *Dayton Time Lock* and *Kelton* **make evident** that under CBPC § 16600 an in-term covenant

> not to compete in a franchise-like agreement will be void if it "forecloses competition in a substantial share" of a business, trade, or market. (*cite omitted*)

(Petitioner's App. p. 29) (emphasis added)

* * *

> Keeping in mind these settled principles of California law . . . which principles were expressly before the arbitrator, we proceed to evaluate whether the arbitrator's decision was in manifest disregard of the law.

(Petitioner's App. pp. 29-30) (emphasis added)

* * *

> The arbitrator's ruling . . . ignores CBPC § 16600 and thus is in manifest disregard of the law.

(Petitioner's App. 32) (emphasis added)

Contrary to Petitioners' assertion that the Panel found that the arbitrator engaged in good faith but erroneous application of state law, the Ninth Circuit clearly determined that the arbitrator's ruling demonstrated that he was aware of the law but chose to "ignore" it. Accordingly, the Ninth Circuit invoked and properly applied the correct standard.

Finally, contrary to Petitioner's baseless assertion, the Ninth Circuit's opinion does not conflict with "every other circuit". (Petition p. 28) In fact, far from Petitioner's contention, none of the circuit courts say that so long as an arbitrator evidenced a "good faith effort" to apply the law then his decision could not be reversed (as Petitioners advocate). On the contrary, the cases Petitioners cite from the First, Third, Sixth, Tenth and Eleventh Circuits all echo the Ninth Circuit's explication of the "manifest disregard of the law" standard, as articulated above.

Indeed, the Second Circuit recently weighed in on the analysis with *Porzig v. Dresdner*, 497 F.3d 133 (2nd Cir. 2007), a decision Petitioners fail to cite to the Court.[11] In *Porzig*, the Second Circuit first articulated that the standard for reversal requires both that the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and that the law ignored by the arbitrators was well-defined, explicit and clearly applicable to the case. Based thereon, the Second Circuit overturned an arbitration panel's award of attorney's fees in favor of the Appellant based on a finding that the arbitrators demonstrated "manifest disregard of the law" because they inexplicably applied a contingency-fee agreement analysis to their calculation of the amount of attorney's fees rather than the loadstar method required by Second Circuit precedent. This analysis and

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[11] The Second Circuit's decision and application of the "manifest disregard of the law" standard is particularly noteworthy not only because of its timeliness but also because New York statute is the basis for the FAA itself. *Hall Street*, p.12 fn.7.

conclusion is completely in line with the Ninth Circuit's decision herein. It is, in fact, consistent with the majority of the circuits in the nation.[12] Contrary to Petitioners' accusation, the Ninth Circuit acted consistently and in accordance with its own established precedent as well as that of the majority of the other circuits.

CONCLUSION

Petitioners are demanding a radical rewriting of this Court's opinion in *Hall Street*, as well as that of the majority of the circuit courts in the country. However, there is no compelling reason to do so. Apart from hungering for yet another bite at the proverbial apple, Petitioners offer no legally sound basis for this Court to grant the petition for certiorari herein.

The Ninth Circuit court below neither strayed from its own precedent nor from this Court's precedent. The Ninth Circuit reasonably and properly applied a well-established standard to reverse a portion of an arbitrator's ruling in accordance with the FAA. Moreover, there is no mature or developed circuit split

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[12] The Eighth Circuit (stating that a party must prove that an arbitrator found a law applicable to the case and acknowledged that he was rendering a decision contrary to law) and the Seventh Circuit (stating that the "manifest disregard" standard is only met when the arbitrator orders the parties to violate the law) are themselves distinct from the majority of the circuits in their interpretation of the "manifest disregard of the law" standard. **However, as these are the exceptions, the Ninth Circuit's siding with its own precedent and the majority of other circuits hardly conflicts "with the law of every other circuit," as Petitioner argue.** (Petition, p. 28)

that the Ninth Circuit opinion contributes to warrant this Court's intervention on this case.

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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